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Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cylex, Incorporated

Serial No. 76481271

Michael E. Whitham of Whitham, Curtis & Cristofferson, P.C.
for Cylex, Incorporated.

Carol Spils, Trademark Examining Attorney, Law Office 101
(Thomas G. Howell, Managing Attorney)

Before Simms, Bucher and Bottorff Administrative Trademark
Judges.

Opinion by Bottorff, Administrative Trademark Judge:

On January 9, 2003, applicant filed the above-captioned application seeking registration of the mark IMMUKNOW (in typed form) for goods identified in the application as "diagnostic reagents for clinical and medical laboratory use; test kits for the detection of lymphocyte function composed of reagents for clinical and medical laboratory use," in Class 5. The application is

based on applicant's asserted bona fide intention to use the mark in commerce. Trademark Act Section 1(b), 15 U.S.C. §1051(b).

At issue in this appeal is the Trademark Examining Attorney's final refusal to register applicant's mark on the ground that the mark, as applied to applicant's goods, so resembles the mark depicted below,



previously registered for goods identified in the registration as "pharmaceutical used in plasma volume and protein substitution, blood coagulation and fibrinolysis, tissue adhesion, intravenous immuno therapy, passive immunization, active immunization and simulation, active immunization and simultaneous prophylaxis,"¹ as to be likely to cause confusion, to cause mistake, or to deceive. See Trademark Act Section 2(d), 15 U.S.C. §1052(d).

¹ Registration No. 1293791, issued September 11, 1984. Affidavits under Sections 8 and 15 accepted and acknowledged.

Applicant and the Trademark Examining Attorney filed main appeal briefs, but applicant did not file a reply brief. An oral hearing was held at which applicant's counsel and the Trademark Examining Attorney presented arguments. We reverse the refusal to register.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn first to the issue of whether applicant's goods and registrant's goods, as identified in the application and registration, respectively, are similar or dissimilar. It is not necessary that the respective goods be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner, or

that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ2d 910 (TTAB 1978).

The Trademark Examining Attorney has submitted a number of third-party registrations which include both pharmaceuticals and diagnostic reagents in their identifications of goods. Although these registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, they nevertheless are probative evidence to the extent that they suggest that the goods or services identified therein are of a type which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard*

Co., Inc., 6 USPQ2d 1467 (TTAB 1988).² In any event, applicant has conceded that many companies market both pharmaceutical products and diagnostic reagents under a single mark. Applicant's counsel also conceded (at the oral hearing) that applicant's diagnostic reagents and its test kits for the detection of lymphocyte function are used to test for the very condition(s) that are treated by registrant's pharmaceutical product. Based on this third-party registration evidence and on applicant's concessions, we find that applicant's goods and registrant's goods, while not identical or competitive, nonetheless are complementary and related products to the extent that they are used in the diagnosis and treatment of the same condition(s).

We also find that the respective goods might be marketed in at least one overlapping trade channel and to at least one overlapping class of purchasers, i.e., to physicians. Neither applicant's nor registrant's

² We note, however, that of the more than fifty third-party registrations submitted by the Trademark Examining Attorney, only a few are probative evidence of the relatedness of the goods, under *Albert Trostel* and *Mucky Duck*. The vast majority of the third-party registrations were issued pursuant to Section 44 without any allegation of use in commerce, and they therefore are not probative. Certain other of the registrations, although use-based, cover goods and services which are dissimilar to the goods at issue in this case (notwithstanding that the words "pharmaceutical" and "diagnostic reagent" appear (in different contexts) in their identifications of goods).

identification of goods includes any limitations or restrictions, so we must presume that the respective goods are marketed in all normal trade channels and to all normal classes of purchasers for such goods. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Registrant's pharmaceutical product, like other pharmaceutical products, normally would be marketed both to the physician who prescribes it to his or her patient, to the pharmacist who dispenses it to the patient, and to the patient directly, via consumer advertising.³ As for applicant's diagnostic reagents and test kits, applicant's identification of goods specifically states that clinical and medical laboratories are the intended users of the products. We reasonably presume that applicant, unlike registrant, does not market its diagnostic reagents and its test kits directly to end consumers (i.e., patients) via mass advertising, nor to pharmacists. However, it also is reasonable to presume that applicant, like registrant, markets its products to physicians, in an effort to persuade the physician whose patient requires a lymphocyte function test to order applicant's test (and not a competing test) from the

³ Cf. *Alfacell Corporation v. Anticancer, Inc.*, ___ USPQ2d ___, Cancellation No. 92032202 (TTAB June 22, 2004); *Kos Pharmaceuticals Inc. v. Andrx Corp.*, ___ F.3d ___, 70 USPQ2d 1874, 1887 n.12 (3d Cir. 2004).

laboratory. These are the same physicians to whom registrant would market its pharmaceutical product in an effort to persuade the physician to prescribe registrant's product for the patient's use. Thus, the physician could order applicant's test to be performed on his or her patient, receive the results of that test, and then prescribe registrant's pharmaceutical to the patient, if appropriate. Even if the physician is not the actual purchaser or end user of either applicant's test or registrant's drug, it is the physician who makes the decision to recommend, order or prescribe utilization of both the test and the drug. To that extent, the purchasers and trade channels for applicant's and registrant's respective products can be deemed to be overlapping.

We also find, however, that these physicians, who comprise the only class of overlapping purchasers, are likely to be knowledgeable, sophisticated purchasers (or prescribers) of the goods at issue. Both applicant's and registrant's products appear to be highly specialized products, designed for specific medical and clinical uses. Likewise, these physicians are highly trained professionals, and they are likely to exercise more than the normal degree of care in determining whether to order applicant's diagnostic test, or to prescribe registrant's

pharmaceutical product. This fact mitigates against a finding of likelihood of confusion. See, e.g., *In re Istituto Sieroterapico E Vaccinogeno Toscano "SCLAVO" S.p.A.*, 226 USPQ 1035 (TTAB 1985); *Astra Pharmaceutical Products v. Beckman Instruments*, 718 F.2d 1201, 220 USPQ 786 (1st Cir. 1983).⁴

We next must determine whether applicant's mark and the cited registered mark, when compared in their entireties in terms of appearance, sound and connotation, are similar or dissimilar in their overall commercial impressions. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more

⁴ Because applicant's goods are not pharmaceutical products which could be substituted for registrant's pharmaceutical product or purchased directly by the patient, the heightened degree of care which must be taken to avoid confusion between pharmaceutical products is not applicable here. Cf. *Alfacell Corporation v. Anticancer, Inc.*, *supra*; *Kos Pharmaceuticals Inc. v. Andrx Corp.*, *supra*.

significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant's mark and registrant's mark are identical in terms of sound; applicant concedes that the marks would be pronounced the same way. In terms of appearance, we find that the design element of the cited registered mark functions merely as a carrier device which performs little or no source-indicating function. Although we do not ignore this design element in our comparison of the marks, we find that it contributes relatively little to the commercial impression of the registered mark. Rather, it is the literal portion of the mark, i.e., IMMUNO, which dominates the mark's commercial impression. We also find that the marks look similar to the extent that both feature a word that begins with the letters IMMU-. The remainders of the marks look different, however, insofar as applicant's mark, but not registrant's mark, contains the readily-perceived word KNOW.

In terms of connotation and overall commercial impression, we find that the marks are more dissimilar than

similar. The cited registered mark directly connotes (indeed, it denotes) the scientific formative term "immuno-." We take judicial notice that "immuno-" is defined as follows in Webster's Ninth New Collegiate Dictionary (1990) at 602: "**immuno-** *comb form* [ISV, fr. *immune*]⁵ **1** : physiological immunity <*immunology*> **2** : immunologic <*immunochemistry*> : immunologically <*immunocompatible*>: immunology and <*immunogenetics*>." The dictionary also includes entries for a number of words which begin with the formative "immuno-," such as "immunoassay," "immunochemistry," "immunodeficiency," "immunogenic," "immunology" and "immunotherapy." The dictionary defines this last word, "immunotherapy," as "treatment of or prophylaxis against disease by attempting to produce active or passive immunity." On its face, registrant's identification of goods suggests that registrant's pharmaceutical product is used in such immunotherapy, i.e., "intravenous immuno therapy [sic], passive immunization, active immunization and simulation, active immunization and simultaneous prophylaxis." Such is

⁵ The dictionary, at page 16, states that the designation ISV stands for "International Scientific Vocabulary," which is used to describe the etymology of technical words which are in international use and which possibly "originated elsewhere than in English."

the connotation of the literal portion of applicant's mark, i.e., IMMUNO.

Applicant's mark IMMUKNOW, by contrast, is a rather cleverly-coined word which combines or conflates the scientific term "immuno-" (which has the connotation described above) and the word "know" (which connotes the knowledge that is gained by use of applicant's test). This transformation of the term "immuno-" into the coined word IMMUKNOW results in a mark which is distinctive, unusual and memorable. As applied to applicant's diagnostic reagents and test kits, the mark creates a commercial impression which is quite dissimilar to the commercial impression created by the cited registered mark.

Viewing the marks in their entirety, we find that although the marks are phonetically identical, they are quite different in terms of their overall commercial impressions. Both marks sound like the scientific term "immuno-," but applicant has cleverly transformed that term into the coined word IMMUKNOW, which on the whole looks different than registrant's mark and has a decidedly different (and distinctive) connotation.

In conclusion, we must presume, given the incontestable status of the cited registration and notwithstanding the dictionary evidence discussed above,

that IMMUNO, the literal portion of registrant's mark, is inherently distinctive as applied to registrant's goods. However, based on the dictionary evidence, we find that IMMUNO nonetheless is highly suggestive as applied to goods in the immunology field such as registrant's, and that it is not a particularly strong source-indicator for such goods. More specifically, we find on this record that the scope of protection to be accorded to registrant's mark is not so broad that it precludes registration of applicant's highly distinctive and quite dissimilar mark, even as applied to applicant's goods (which are somewhat complementary to registrant's goods). *Cf. Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991). Moreover, the only overlapping class of purchasers for the respective goods is the physicians who conceivably might order applicant's test from laboratories, and who would prescribe registrant's drug to patients (via a pharmacist). These physicians are likely to exercise a sufficient degree of care in ordering or prescribing these respective goods that source confusion is not likely to result from use of the dissimilar marks IMMUNO and IMMUKNOW.

For these reasons, and on this record, we conclude that confusion is not likely to result from applicant's use

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of its IMMUKNOW mark on the goods identified in the application.

Decision: The refusal to register is reversed.